

EXHIBIT S

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1CLKFLES SENTENCE

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 UNITED STATES OF AMERICA,

4 v.

11 CR 32 (JSR)

5 JAMES FLEISHMAN,

6 Defendant.

7 -----x

8 New York, N.Y.
8 December 21, 2011
9 11:43 a.m.
9

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge

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14 APPEARANCES

15 PREET BHARARA,
16 United States Attorney for the
16 Southern District of New York
17 DAVID S. LEIBOWITZ
17 ANTONIA APPS
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1 of debate over what the the sentencing calculation, guideline
2 calculation should be, even though that is only one factor
3 among many that the Court must consider under Section 3553(a).
4 And the parties have even threatened to present evidence here
5 today, which of course I'm looking forward to immensely.

6 But my question for counsel is this: If the basic
7 conspiracies of which Mr. Fleishman was convicted consisted of
8 his unlawfully, willfully and knowingly joining in a plan to
9 facilitate the distribution of inside information by others --
10 persons at his company, et cetera -- isn't the best measure of
11 loss the intended loss as opposed to any actual loss? He would
12 be less in a position to appreciate what would be the actual
13 gains and losses in any particular transaction since he was
14 often one step removed, but he would know, and intend, that by
15 repeatedly facilitating the distribution of inside information
16 to others, that those in receipt of it would gain and others
17 therefore would lose.

18 So isn't the best measure to be utilized here intended
19 loss as opposed to any actual loss? Let me hear from the
20 parties on that.

21 MR. APPS: I'm happy to go first, your Honor.

22 I agree with that statement, your Honor. I think the
23 essence of Mr. Fleishman's criminal conduct is really not the
24 actual trades that the government has highlighted, it's the
25 intended loss, as the Court says. Mr. Fleishman knew he had

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1 clients who were multimillion-dollar hedge funds and
2 multibillion-dollar hedge funds. The purpose of the business,
3 as was established at trial, was to get detailed data points to
4 those clients that wanted it, was to get inside information to
5 those clients who wanted to use it, and the understanding was
6 that those clients would use that information to trade.

7 Now, whether that number then, the intended loss
8 number, your Honor -- and this is the difficulty of this case
9 for sentencing purposes -- whether that number is \$5,000 or
10 \$50 million, while technically foreseeable to Mr. Fleishman,
11 because of the nature of the hedge funds, that are the clients,
12 that are getting this inside information, it really does not
13 capture the essence of the criminal conduct for which
14 Mr. Fleishman was convicted, because in some sense of the
15 arbitrariness of how high or low that number could be, it is
16 arguably all intended loss.

17 THE COURT: Yes, of course what you're saying really
18 cuts further. What you're saying is that the guidelines fetish
19 with the calculation of loss, whether actual or intended or
20 however, poorly fits this situation. Of course I would
21 hesitate to be as deeply critical of the guidelines as you
22 clearly are, but I think there's some force to your criticism.

23 MR. APPS: May I just say, your Honor, I do believe
24 this is a unique case in that respect, and I of course --
25 nothing I am saying should be read to say I reject the

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1 guidelines in any way, shape or form.

2 But I think that what I have highlighted --

3 THE COURT: Some people need to preserve their job at
4 all costs.

5 MR. APPS: I hope to be able to go to work tomorrow,
6 your Honor.

7 THE COURT: Yes.

8 MR. APPS: But I think that's the reality of the
9 nature of the evidence and the nature of the conduct in this
10 case. That may mean that your Honor says I don't think we
11 should attribute trades under that loss table, maybe a better
12 proxy for the nature of this criminal conduct is
13 Mr. Fleishman's salary. We presented evidence of the salary in
14 the papers that it was 829-odd-thousand dollars for the
15 three-year period. Maybe there's some other measure.

16 Your Honor, we also highlighted for the Court on the
17 wire fraud case, you know, we asked public companies, can you
18 put a dollar figure on the harm. They all testified --
19 convincingly, I would submit to the Court -- that the conduct
20 presented at trial did harm the companies. There were a number
21 of specific ways in which the disclosure by the insiders was
22 materially harmful to the companies.

23 That doesn't mean that putting a dollar figure on that
24 is feasible for sentencing purposes. And accordingly, we are
25 left in a little bit of a quandary and the Court may quite

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